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No. 90-1279

In The

Supreme Court of the United States

October Term, 1991

MYRA JO COLLINS,

Petitioner,

v.

THE CITY OF HARKER HEIGHTS, TEXAS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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INTRODUCTION

Respondent, the City of Harker Heights, Texas (hereinafter "City") and its *amici*, National League of Cities, *et al.*, (hereinafter "NLC") presume incorrectly to restate Petitioner's position, thereby setting up straw men to knock down. For example, they contend that Petitioner (hereinafter "Collins") seeks to extend Section 1983 and constitutional due process protection to municipal actions that fall short of abuse of governmental power. They are wrong. Collins correctly argues that abuse of governmental power is not a separate element of a Section 1983 claim. Rather, abuse of power is established by the City's policy of deliberate indifference in actively placing decedent into a position of danger known to it. Petitioner's Brief at 18-23. This is not after all an ordinary tort case, as the City and the NLC argue; it is a case in which the City – without justification and in violation of statutorily mandated protection – failed to warn, train or properly equip decedent and his supervisors, thereby directly causing decedent's death.

The City's and the NLC's arguments offer precious little case analysis. Instead, they refer to and quote isolated language in court decisions. *E.g.*, Respondent's Brief at 8-13; NLC Brief at 9-10. Principally, the City's and the NLC's arguments begin and end with reliance on convoluted notions of federalism, soldiered by irrelevant parades of horribles. Stripped of their faulty analysis of the precedents and lapses of logic, the City's and the NLC's arguments are reduced to cries of "floodgates". *E.g.*, Respondent's Brief at 18.

The City and the NLC espouse a bright line test, within the municipal employment context, for determining the availability of substantive due process protections to municipal employees. They declare without reason that the only workable test is to exclude substantive due process from the municipal workplace, thereby throwing the baby out with the bath water.

No such bright line jurisprudence is called for, however. Federalism is sufficiently preserved if substantive due process applies only "where the state abuses its governmental power

through an alleged policy of actively placing a person into a situation of known danger . . . . " *Ruge v. City of Bellevue*, 892 F.2d 738, 741 (8th Cir. 1989). *See Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989), *cert. denied, sub nom Spears v. Cornelius*, 494 U.S. ___, 108 L.Ed. 2d 785 (1990) (which is not mentioned by Respondent or its *amici*). *See also, e.g., Daniels v. Williams*, 474 U.S. 327, 334-335 (1986).

Contrary to the City's and the NLC's suggestions, federalism has survived the recognition that Fourteenth Amendment protections, and Section 1983, extend beyond their core purposes of protecting the "freed men" and their white supporters. *See, e.g., Monell v. Department of Social Services*, 436 U.S. 658 (1978) (sex discrimination in employment). It has also survived the application of constitutional protections more amorphous than specific prohibitions of the Bill of Rights to the municipal employment relationship. *E.g., Monell*, applying the equal protection of the laws to municipal employment, a subset of substantive due process (*see* H. Monaghan, Of "Liberty and Property," 62 Cornell L. Rev. 405, 416-420 (1977)). Federalism has even survived the Court's recognition that Congress has broad powers to create and define civil rights and liberties of artificial persons that are enforceable against municipalities under Section 1983. *E.g., Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) (private corporations may sue a municipality under Section 1983 to enforce rights implicit in the National Labor Relations Act).

Federalism will also survive and be strengthened by this Court's express recognition that, in certain very limited circumstances, substantive due process has been violated when a municipality has acted pursuant to a policy or custom of deliberate indifference to the life (or bodily security) of its employees. Similarly, it will survive and be strengthened by this Court's recognition that in very limited circumstances States create life (and bodily security) interests that give rise to substantive due process protection enforceable under Section 1983.

ARGUMENT

I.

COLLINS HAS PROPERLY STATED A CLAIM FOR MUNICIPAL LIABILITY UNDER SECTION 1983 FOR VIOLATION OF DECEDENT'S SUBSTANTIVE DUE PROCESS RIGHTS.

Section 1983 does not create any substantive rights. *E.g., Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979). It facilitates the judicial implementation and enforcement of federally secured rights. Thus, by filing an action under Section 1983, a plaintiff does not allege violation of that statute. *Compare* NLC Brief at 6. Subject to affirmative defenses, in order to prevail in an action filed pursuant to Section 1983, Collins must plead and prove only that a proper defendant, *i.e.*, a "person" within the meaning of Section 1983, (1) acted under color of state law and (2) violated a federally protected right. *Gomez v. Toledo*, 446 U.S. 635 (1980).

The City's discussion of the core purposes and original understanding of Section 1983 is largely irrelevant, as well as somewhat incorrect. Respondent's Brief at 6-8. First, this Court has recognized that both Section 1983 and the Fourteenth Amendment extend protection to all "persons" – not just to the "freedman" and his white supporters. *E.g., Monell.* Further, these protections apply to municipal employees *vis-a-vis* their employers concerning work conditions and circumstances. *Ibid.*

Second, as this Court has repeatedly held, Section 1983 is a broad remedial statute, which is to be interpreted generously. *E.g., Monell*, 436 U.S. at 683-85; *Maine v. Thiboutot*, 448 U.S. 1 (1980).

Third, much of the congressional debate and "purpose" relied upon by the City and the NLC are inapposite, as Section 1 of the Civil Rights Act of 1871 (presently Section 1983) was not the focus of the debate. "Section 1 of the 1871 Civil Rights Act was the least controversial provision of that Act; and what little debate did take place as to § 1 centered

largely on the question of what protections the Constitution in fact afforded." *Chapman*, 441 U.S. at 610-11 (footnotes omitted), referencing *Developments in the Law: Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1155 (1977) (relied upon by the City).

A.

Collins Has Properly Alleged the Necessary *Monell-Harris* Components of a Section 1983 Municipal Liability Failure to Train Claim.

The City is a "person" and therefore a proper defendant under Section 1983. *E.g., Monell v. Department of Social Services*, 436 U.S. 658. Its liability in a Section 1983 action, however, cannot be based upon *respondeat superior*. *Ibid.* Thus, the City is liable under Section 1983 only if the acts complained of resulted from, *i.e.*, were "caused by," a municipal policy or custom. *E.g., City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989).

The NLC would stand this limitation on its head and require that when a municipality has not adopted a formal policy, Section 1983 actions against the municipality must be derivative of an "unconstitutional act committed by an employee of the city, . . . with 'requisite scienter to establish a constitutional violation'." NLC Brief at 12, *quoting Harris*, 489 U.S. at 388 n.8. Nothing in the *Harris* decision so holds. In fact, in *Harris*, this Court expressly held that:

> [T]he proper standard for determining when a municipality will be liable under § 1983 for constitutional wrongs does not turn on any underlying culpability test that determines *when such wrongs have occurred.*

Ibid. (emphasis added).

In other words, a municipality is culpable if it has adopted or maintained a policy or custom of deliberate indifference that is causally linked to an injury that implicates a federally secured right. The "culpability" of the other state actors, *i.e.*, the municipality's agents, who are the more direct or efficient cause of the injury, largely is irrelevant. These

agents may merely be negligent. *See Harris*. They may also be obeying the municipal policy. *See Monell.*

Despite this Court's pronouncement in *Harris*, according to the NLC:

> [W]here a police officer has shot and killed an individual, there is no due process violation if the officer acted negligently because a negligent act does not constitute a deprivation of due process. Accordingly, a city would not be liable under Section 1983 even if it had acted with deliberate indifference in training the officer because there still would be no underlying constitutional violation.

NLC Brief at 12.

On its facts, however, *Harris* was a case in which the actual state actors, arresting officers and their immediate supervisors, at most were guilty of negligence precisely because of the City of Canton's custom or policy of inadequately training them. The "intent" component of the claim in *Harris* was satisfied by the municipality's policy or custom of "deliberate indifference." Moreover, in this case, the actions under color of state law of which Collins complains include those of decedent's supervisor. *See* Jt. App. at 31. The supervisor's actions also evidenced his own knowing deliberate indifference. *See, e.g.*, Complaint, Jt. App. at 7, ¶ 2.

Monell requires that a municipal policy or custom be established as an element of municipal liability under Section 1983. However, adoption of that policy need not be formal or express. In a failure to train case, which this is, the municipality will be liable if the acts that caused the deprivation of a federally protected right themselves were caused by the municipality's policy or custom of deliberate indifference to the rights of the persons who were injured. *Harris*. This is what Collins has alleged.

Thus, if there is any "constitutional requirement of scienter under the Due Process Clause," NLC Brief at 12, it has been fully satisfied here by the municipality's and its supervisor's actions. However, actual subjective "scienter" is not required.

This Court's most recent refinement of the deliberate indifference standard appears in *Wilson v. Seiter*, 501 U.S. ___, 115 L.Ed.2d 271 (1991), decided the very day Collins filed her opening brief. *Wilson* is wholly consistent with the analysis presented in that brief.

In *Wilson*, this Court held that the deliberate indifference standard is a necessary component of any Eighth Amendment claim brought by a prisoner for alleged failure to provide medical treatment or humane conditions of confinement. In *Wilson*, this Court expressly differentiated between the "state of mind" showing necessary to make out "deliberate indifference" and "the very high state of mind prescribed by *Whitley* [*v. Albers*, 475 U.S. 312 (1986)]." *Wilson*, 115 L.Ed.2d at 281. The Court held that "deliberate indifference" does not include "wantonness consist[ing] of acting 'maliciously and sadistically for the very purpose of causing harm.' " *Wilson*, 115 L.Ed.2d at 281, *quoting Whitley*.

This middle ground between negligence and malicious intent, encapsulated in the concept of "deliberate indifference" has long been recognized in tort law. Prosser and Keeton have termed this middle ground

> [a] penumbra of what has been called "quasi intent." To this area the words "willful," "wanton," or "reckless," are customarily applied. . . . They apply to conduct which is still, at essence, negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if it were so intended. . . . The usual meaning assigned to [these terms] . . . is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and thus is usually accompanied by a conscious indifference to the consequences.

Prosser & Keeton, *The Law of Torts*, § 34 at 212-13 (5th ed. 1984).

Once malice is distinguished from deliberate indifference, it follows that deliberate indifference does not

involve a subjective determination of the state actor's intent or require direct proof of a person's actual state of mind. As Prosser and Keeton put it:

> Since [conscious indifference] is almost never admitted, and can be proved only by the conduct and the circumstances, an objective standard must of necessity in practice be applied. The "willful" requirement, therefore, breaks down and receives at best lip service, where it is clear from the facts that the defendant, whatever his state of mind, has proceeded in disregard of a high and excessive degree of danger, either known to him or apparent to a reasonable person in his position.

Prosser & Keeton, *The Law of Torts*, § 34 at 213-14.

Contrary to the contentions of the NLC (NLC Brief at 11-13), Collins amply made the requisite *Monell-Harris* allegations for municipal liability here. *See generally* Complaint, Jt. App. at 3-8; Petitioner's Brief at 2-5 (quoting and summarizing the allegations). The City and the NLC entirely ignore these deliberate indifference and causation allegations.

The City and the NLC also ignore the principle that an action may be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure, only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations. *Conley v. Gibson*, 355 U.S. 41, 46-51 (1957); *see, e.g., Zinermon v. Burch*, 494 U.S. ___, 108 L.Ed.2d 100, 117 (1990). Thus, for example, the NLC improperly relies on post-trial and summary judgment decisions to argue that the Complaint is inadequate. *E.g.*, NLC Brief at 13, n.4, relying on *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821 (1985).

B.

Collins Has Properly Alleged the Necessary Color of State Law and Invasion of Federally Protected Rights Elements of a Section 1983 Claim.

In addition to satisfying all *Monell-Harris* pleading requirements, Collins' complaint also properly pleads the

necessary elements of her Section 1983 claim. First, as alleged, the City's policy of deliberate indifference in failing to train, equip or supervise, constituted actions of the City performed under color of state law. A municipality cannot perform otherwise. All other acts causing decedent's death also were performed under color of state law. *Compare DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). *See* Petitioner's Brief at 20-22. Thus, the first "element" of Collins' Section 1983 claim is fully satisfied. *See Gomez v. Toledo*, 446 U.S. 635.

All that remains, therefore, is to determine whether Collins can plead the second element of the Section 1983 claim, invasion by the City of a federally secured right enjoyed by decedent. Collins has so pled and the pleading is sufficient.

Section 1 of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty or property without due process of law. . . . " This Court has held that due process of law includes a substantive component that does not depend upon other express protections in the Constitution. At the very least, substantive due process bars "certain government actions [invasive of life, liberty or property] regardless of the fairness of the procedures used to implement them. . . . " *Daniels v. Williams*, 474 U.S. at 327, 331. *Accord Davidson v. Cannon*, 474 U.S. 344 (1986). *See* cases discussed in *Daniels* at 431-32; Petitioner's Brief at 29-37.

It follows from the language of the Fourteenth Amendment, which protects "life, liberty or property" and this Court's decisions, that substantive due process protects a person's "life" from gross abusive actions of government, *i.e.*, actions constituting abuse of government power. *E.g.*, *Daniels*; *Davidson*; *Harris*. In other words, abuse of government power is inherent in a municipality's invasion of a federally secured right, such as "life" or bodily security, if the injury is caused *by the municipality* with sufficient deliberate indifference. Petitioner's Brief at 29-37. *See Ruge v. City of Bellevue*, 892 F.2d at 741 and n.6; *see also McClary v. O'Hare*, 786 F.2d 83, 89, n.6 (2nd Cir. 1986). The City now admits that "the Fifth Circuit may have been overly technical in stating that abuse of power was an independent aspect of a

§ 1983 claim. . . . " Respondent's Brief at 13-14 n.11. No amount of quoting this Court's decisions out of context by the NLC or the City can make "abuse of governmental power" into a separate element of a Section 1983 claim.

This Court's controlling decisions teach that the difference between a government-caused loss of life that constitutes abuse of government power, and therefore violates due process of law, and one that does not, turns entirely on considerations of whether the *particular defendant* acted with deliberate indifference or just mere negligence. *See, e.g.*, *Davidson*, 474 U.S. at 347. Thus this Court has adopted the "deliberate indifference" standard as part of the definition of the Fourteenth Amendment substantive due process right enjoyed by the particular plaintiff *vis-a-vis* the particular defendant.

This "deliberate indifference" component of the constitutional right essentially is the same as the standard for establishing municipal liability in a failure to train case. *See Harris*; Point I.A., *supra* at 4-7. Hence, it is difficult not to conflate the two components. *Compare* NLC Brief at 12.

Municipal adoption and implementation, whether formal or otherwise, of a grossly deficient policy of deliberate indifference must be established to demonstrate the possibility of municipal liability under *Monell*. Under *Harris*, invasion of the substantive due process right results from the municipality's "acts" of deliberate indifference in failing to train if that failure is a proximate cause of injury to a person's life, liberty or property, where, as here, no efficient independent private cause has intervened. *DeShaney*, 489 U.S. 189. *See* Petitioner's Brief at 20-22. Because the state actor in a failure to train case is the municipality itself, the culpability of the municipal employees or agents who visit the actual harm on the plaintiff is irrelevant to the municipality's liability. All that is necessary is that the municipality's failure to train have "caused" the agents' actions which in turn "caused" the deprivation of the constitutional rights. *Harris*. *See* Point I.A., *supra* at 4-7.

Contrary to Respondent's arguments, this Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976) is inapposite.

Respondent's Brief at 10-11, 15-18. Moreover, *Paul* preceded *Daniels* and *Davidson* by a decade; it preceded *Harris* by 13 years. Those later cases are controlling as to substantive due process life and bodily security claims, not *Paul*, which involved injury to plaintiff's reputation.

In *Paul*, the Court held that the Due Process clause is not to become "a font of tort law to be superimposed upon whatever systems may already be administered by the States." 424 U.S. at 701. Collins does not contend otherwise. The Court also held that the Due Process clause does not "ex proprio vigore extend [to plaintiffs] a right to be free of injury whenever the State may be characterized as the tortfeasor." *Ibid.* Collins does not contend otherwise. Specifically, in *Paul*, the Court held that, without more, even intentional invasion of a person's reputation, by state actors, does not violate the Due Process clause where the invasion of reputation "does not result in deprivation of any 'liberty' or 'property' recognized by state or federal law, nor . . . work[] any change of respondent's status as theretofore recognized under the State's laws." 472 U.S. at 712.

The Court's only discussions, in *Paul*, of state actions invasive of a substantive due process interest in life recognized that negligent acts "under color of state law" that take a person's life do not of themselves violate the Fourteenth Amendment. *Paul*, 424 U.S. at 698. Similarly, the Court properly identified the heightened standards that must be met for *criminalizing* state taking of a human life. *Id.* 424 U.S. at 699-700.

In its discussion, the *Paul* Court acknowledged that "it is surely far more clear from the language of the Fourteenth Amendment that 'life' is protected against state deprivation than it is that reputation is protected against state injury." *Ibid.* As the Court in *Paul* acknowledged, "life" is specifically enumerated in the due process clause of the Fourteenth Amendment; reputation is not expressly protected anywhere in the Constitution, and the Court declined in *Paul* to infer such protection from any provision of the Constitution. By contrast, *Daniels*, *Davidson*, *Harris* and numerous other decisions make it clear that life and bodily security are included

within substantive due process protection from "deliberate indifference."

C.

Collins' Properly Pleaded Section 1983 Claim is Not Barred by Virtue of Decedent's Status as a Municipal Employee.

All that remains to the City's and the NLC's legal position is their argument that a municipality's invasion of an employee's life or bodily security can violate no constitutional interest because the invasion occurs through the municipality's action as employer. Respondent's Brief at 14-17; NLC's Brief at 16-20. They overstate their position.

The City and the NLC essentially argue that deprivation of life is wholly unprotected within the municipal employment relationship. This Court has never so held. However, it has repeatedly recognized that whatever constitutional protections are available to a person protect that person within his or her employment relationship from adverse action by his or her public employer. *E.g.*, *O'Connor v. Ortega*, 480 U.S. 709 (1987). *See* Petitioner's Brief at 25-29. Contrary to the implications of the City and the NLC's arguments, many of this Court's decisions on this subject involve employee lawsuits charging the employer with adverse action taken by the municipal employer as employer against the municipal employee as employee, *not* action taken by the government against the governed. *E.g.*, *Ortega*; *Monell*.

The City and the NLC are reduced to arguing that substantive due process protection of life somehow is different from other constitutional protections, so far as application to the municipal employer-employee relationship is concerned. *See* NLC Brief at 19-20; Respondent's Brief at 17-19. Apart from sloganizing, the only ostensible argument offered for this proposition is that public employees are not "restrained in their liberty" in the same way as are prisoners or involuntarily committed mental patients. NLC Brief at 17-19; Respondent's Brief at 14-15. Yet, as the NLC quoted in its Brief at 17, this Court has held, in the involuntary commitment context, that

the Due Process clause imposes on the States an "unquestioned duty to provide reasonable safety for all residents *and personnel* . . . . " *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (emphasis added). This is so even though the "personnel" of mental hospitals, like sewer workers, presumably are "free" to quit their jobs if they do not like the "safety" conditions.

The fact that a person is incarcerated has a bearing on whether that person is protected by the Eighth Amendment. *Ingraham v. Wright*, 430 U.S. 651 (1977). Neither a public school student's obligations under compulsory school attendance laws nor one's obligations as a public employee sufficiently constrain one's liberty to engage the Eighth Amendment's protection. *Ibid.* Both, however, the student and the public employee are sufficiently "subjected" to government power to engage procedural due process protections of the Fourteenth Amendment. *Ibid*; *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *see also* Petitioner's Brief at 25-27. The NLC's textual argument, based on the actual words of Section 1983 (NLC Brief at 6), actually demonstrates this point.

Only a person "who under color of [law], . . . subjects or causes to be subjected, any . . . person to the deprivation of any rights . . . secured by the Constitution or laws, shall be liable to the party injured in an action at law. . . . " 42 U.S.C. section 1983. The "contemporary source" relied upon by the NLC defines the word "subjection" as: "The obligation of one or more persons to act at the discretion or according to the judgment and will of others." 2 Bouvier's Law Dictionary 553 (11th ed. 1865), *quoted in* NLC Brief at 6. The NLC paraphrases the remainder of the 1865 definition as follows: "Subjection was separated into two categories, private subjection such as that of parents over children; and public subjection, of government over the citizenry." NLC Brief at 6 n.3. This paraphrase is grossly misleading. According to the 1870 edition of Bouvier's, "subjection" means:

> The obligation of one or more persons to act at the discretion or according to the judgment and will of others. *Private subjection is subjection to the authority of private persons. Public subjection is the subjection to the authority of public persons.*

2 Bouvier's Law Dictionary 551 (14th ed. 1870) (emphasis added).

Whatever "subjection" may have connoted in 1870 or now connotes, the denotation has remained the same. *Accord* Black's Law Dictionary 1278 (5th ed. 1979) (using only the same first sentence as in Bouvier's). Moreover, at present, "subjects to," undefined in Bouvier's, is now defined as "liable, subordinate, subservient, inferior, obedient to, governed or affected by; provided that; provided; answerable for." *Black's*, at 1278. In any event, within his or her job, even applying the Nineteenth Century definition of "subjection" to today's world (see Petitioner's Brief at 26-27), a municipal employee is "obligated to act at the discretion or according to the judgment or will of . . . " the municipal employer.

The constraints of procedural due process would apply to action by a municipal employer, acting as employer rather than as governor, to protect a municipal employee's property and liberty interests in public employment, and to extend procedural due process protection to those interests. *E.g.*, *Cleveland Board of Education v. Loudermill*, 479 U.S. 532. Logic does not permit a contrasting rule that substantive due process constraints never apply to protect the same employee's life or bodily security. In fact, contrary to the City's and the NLC's arguments, at least three of the Circuits properly have recognized that substantive due process protects the public employee's "life" or bodily security from highly culpable invasion by the employer. *Ruge v. City of Bellevue*, 892 F.2d 738; *Cornelius v. City of Highland Lake, Alabama*, 880 F.2d 348 (ignored by the City and the NLC); *McClary v. O'Hare*, 786 F.2d at 89 n.6 (relevant discussion ignored by the City and the NLC).

II.

THE TEXAS HAZARD COMMUNICATION ACT CREATES A FOURTEENTH AMENDMENT DUE PROCESS LIFE AND LIBERTY INTEREST IN PROTECTION FROM THE VERY HAZARDS TO WHICH DECEDENT SUCCUMBED, THAT IS COGNIZABLE UNDER SECTION 1983.

The City appears to concede that, as pled, its failure to warn, train, equip or supervise violated the Texas Hazard

Communication Act. Respondent's Brief at 21-27. The City appears to argue, however, that the existence of public enforcement remedies under the Act, and private remedies under Texas' workers' compensation law, preclude Collins from relying on the Hazard Communication Act as a source of federally protected rights enforceable under Section 1983. Respondent's Brief at 22 n.15; *id.* at 2 nn. 2 & 3. (Most of the facts presented by the City are not in the record.) *See also* NLC Brief at 25. The City is incorrect.

The existence of workers' compensation remedies does not defeat Collins' Section 1983 claim for violation of decedent's substantive rights. *E.g., Zinermon v. Burch*, 494 U.S. ___, 108 L.Ed. 2d 100 (1990) (post deprivation state remedy not relevant to deprivation of substantive constitutional rights); *Monroe v. Pape*, 365 U.S. 167 (1961). Moreover, because Collins alleges that the City's policy of deliberate indifference caused decedent's death, it cannot be assumed or suggested that the constitutional violation resulted from "random *and* unauthorized" violations of State law. Availability of state remedy, therefore, is irrelevant. *Zinermon. See also* Petitioner's Brief at 47, discussing adequacy of post-deprivation remedies. (In the citation to *Zinermon* in the Opening Brief, Petitioner inadvertently linked *Zinermon's* holding to claimed violations of a "liberty interest". The correct link is to a claimed violation of a "substantive constitutional right".)

Similarly, the existence of a state statutory remedy under the Texas Hazard Communication Act does not preclude reliance on the Act as a basis for a Section 1983 claim. First, the "liberty" and "life" interests afforded by the Act's "substantive predicates" are themselves substantive and therefore cannot be satisfied by a state post-deprivation remedy. *See Zinermon*. Moreover, once the state creates an interest that is subject to constitutional protection, the adequacy of the state protection or remedy itself is a federal constitutional issue. *See, e.g., Zinermon*. Second, the Act's "post-deprivation" remedies are inadequate as the Act provides only limited public remedies that include no compensation to Collins for the loss of her husband. Br. App. A-12-13, Section 13, Texas Health and Safety Code (hereinafter "H. & S. C.") Section

502.012 (Vernon 1991) (Citations to the Act are to the Appendix to Petitioner's Brief and to the H. & S. C. *See* Petitioner's Brief A-1-33.) Moreover, the Act specifically provides that its criminal penalty for causing injury to an employee "does not affect any other right of an employee or any other person to receive compensation for damages under other law." Br. App. A-13, Section 13(c), H. & S. C. Section 502.012(g). *Cf. Golden State Transit Corp. v. City of Los Angeles*, 107 L.Ed.2d at 428.

The NLC argues that the Texas Hazard Communication "Act does not protect workers in Collins' position." NLC Brief at 20-21. The NLC's argument relies entirely on the fact that sometimes the Act speaks of workers' "use" or "handling" of hazardous chemicals rather than as the Act often does of their contact with or "exposure" to them. *Ibid.*

The NLC reads the Act too selectively, as the Act's announced purpose is to protect "employees *who may be exposed to* hazardous chemicals in nonmanufacturing employer workplaces. . . . " Br. App. A-4, Section 2, H. & S. C. Section 502.002 (emphasis added). Moreover, "employee" is defined as "any person who *may be or may have been exposed to* hazardous chemicals in the person's workplace under normal operating conditions or foreseeable emergencies." Br. App. A-5, Section 3(6), H. & S. C. Section 502.003(9) (emphasis added). Moreover, "New or newly assigned employees shall be provided training before working with *or in a work area containing hazardous chemicals.*" Br. App. A-11, H. & S. C. Section 502.010(d) (emphasis added). "Employees *who may be exposed to* hazardous chemicals shall be informed of the exposure. . . . " Br. App. A-14, Section 15(a), H. & S. C. Section 502.013(b) (emphasis added); *Accord*, Br. App. A-22, Section 2, Texas Administrative Code, Section 295.5 (Notice form).

Further evidence of the Act's application in this case is provided by the definition of " 'nonmanufacturing employer' or 'employer' " to include an employer in "sanitary services" and municipal employers. Br. App. A-6-7, Section 3(13), H. & S. C. Section 502.003(16).

Finally, for good reason the City did not join the NLC's argument, which was not raised below or previously to this Court. If there were any doubt as to the applicability of the Act, the State of Texas does not share that doubt. On May 31, 1989, the State of Texas sued the City of Harker Heights in the District Court of Bell County, Texas for violations of the Texas Hazard Communication Act causing decedent's death. On November 9, 1989, a Judge of that Court entered an Agreed Final Judgment, by which, admitting no liability, the City agreed to pay civil fines of $3,000, attorneys' fees of $1,000 and costs. Petitioner has moved this Court to take judicial notice of certified copies of the Docket Sheet, Petition and Agreed Final Judgement in that case, *State of Texas v. City of Harker Heights*, Bell County, Texas District Court No. 124,477-C. Certified copies of the above-described documents are attached to the Motion.

The City's and the NLC's substantive arguments as to the Texas Hazard Communication Act warrant little response here, as they were largely anticipated and answered in Collins' Opening Brief (at 40-47). Their arguments consist mostly of trumpeted slogans, including "floodgates" and "parade of horribles." Respondent's Brief at 17-21. These concerns are addressed in point III below.

One argument presented by the NLC is the obverse of the City's and the NLC's argument that the Due Process clause itself confers no substantive due process right on Collins that is cognizable under Section 1983. The NLC argues that because the Texas Hazard Communication Act extends its protections to both public and private employees, it is insufficiently specific in "govern[ing] the relation between the State and a defined group of individuals" to give rise to federal due process protection. NLC Brief at 23. By contrast, in opposing Collins' pure substantive due process claim, both the NLC and the City argue that, within the employment relationship, public employees are entitled to no greater protection of life or bodily security than are private employees. NLC Brief at 9-10; Respondent's Brief at 15-17.

This Court's decisions recognizing constitutional protection for state-created property and liberty interests for

employees does not require that the state statute, creating the "substantive predicates," protects only public employees. *Cf. Golden State Transit Corp. v. City of Los Angeles*, 107 L.Ed.2d at 421 ("The availability of the § 1983 remedy [to enforce a federal statute governing collective bargaining relations in the private sector] turns on whether the statute, by its terms or as interpreted, creates obligations 'sufficiently specific and definite' to be within 'the competence of the judiciary to enforce' . . . is intended to benefit the putative plaintiff and is not foreclosed 'by express provision or other specific evidence from the statute itself.' " (citations omitted)).

Moreover, contrary to the NLC's arguments (NLC Brief at 24), private employees will not be able to sue private employers under Section 1983 for injuries due to violations of the Texas Hazard Communication Act, as private employers owe no constitutional obligations to their employees, and in any event private employers do not act "under color of state law." *See O'Connor v. Ortega*, 480 U.S. 709.

Finally, recognition of Collins' claim based on the Texas Hazard Communication Act will open no "floodgates" and will not jeopardize "federalism". The municipality will be liable under Section 1983 only when a municipality violates a state regulation pursuant to the municipality's policy or custom, only when the municipality's policy or custom rises to the level of "deliberate indifference" to and proximately causes deprivation of the employee's rights, and only if no independent private cause intervenes. *Contrast* NLC Brief at 25. Further, no claim would lie against a municipal employee's fellow servants, as only the municipal "employer" owes duties under the Act.

In enacting the Act, the State of Texas has balanced the interests of employees and employers, including municipal employees and employers, and mandated substantive predicates creating a justifiable expectation of certain protections of employee's lives and bodily security. *Cf. Washington v. Harper*, 499 U.S. 210 (1990). As the principal guardian of federalism within its own borders the State of Texas is free to close that "floodgate" any time it chooses. *Cf. Golden State Transit Corp.*, 107 L.Ed.2d at 432.

III.

JUDICIAL RECOGNITION OF PETITIONER'S CLAIMS WOULD NOT "OPEN THE FLOODGATES," THREATEN THE PROPER ORDER OF CONSTITUTIONAL FEDERALISM, RENDER SECTION 1983 "A FONT OF TORT LAW" OR OTHERWISE "FEDERALIZE THE LAW OF TORT" OR "TRIVIALIZE THE CONSTITUTION."

Collins has not pled an "ordinary" tort. She has pled "deliberate indifference" by the City that actually caused her husband's death. He was sent to his death by the City, without warning, training, equipment or supervision, even though the City knew of the extraordinary risk of death decedent faced *and* the City was required by a state statute properly to warn, train, equip and supervise decedent. Whatever may have been happening elsewhere in the State of Texas, plainly the City was "unwilling[] to enforce relevant State law." *See* NLC Brief at 7.

The City's attempt to trivialize what it did to decedent by presenting hypotheticals involving, for example carpal tunnel syndrome, is argument by naked *reductio ad absurdum*. *See* Respondent's Brief at 19-20, 23.

Municipal employees and their attorneys may not simply invoke the words "deliberate indifference" or "custom or policy," and proceed to sue a municipality under Section 1983. They cannot convert mere negligence into "deliberate indifference," if there are no facts to bear out their claims.

It is ironic that the City's "floodgates" argument turns on its misperception that:

> The lines between ordinary negligence, gross negligence, reckless disregard, and conscious disregard are fuzzy ones. Our courts are not equipped to dispose of these cases by motions to dismiss or motions for summary judgment.

Respondent's Brief at 20.

Fortunately, this Court disagrees. As then Associate Justice Rehnquist stated, when a Section 1983 plaintiff's attorney made a similar argument:

> In the first place, many branches of the law abound in nice distinctions that may be troublesome but have been thought nonetheless necessary[.] . . . More important, the difference between one end of the spectrum – negligence – and the other – intent – is abundantly clear. See O. Holmes, The Common Law 3 (1923). In any event, we decline to trivialize the Due Process clause in *any* effort to simplify constitutional litigation.

Daniels, 474 U.S. at 434-35 (citations omitted) (emphasis added).

In evaluating complaints under Section 1983, certainly by the summary judgment stage, trial judges will be able to determine whether plaintiff has any evidence of "deliberate indifference," municipal "custom or policy," causation and damages. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In making that assessment, these judges may give due consideration as well to doctrines such as "assumption of the risk." *See* Petitioner's Brief at 38-40.

Since judges cannot always forget as judges what they know as people, we can be confident that facially frivolous or outrageous claims will be dismissed under Rule 12(b)(6). *See, e.g., Anderson v. Everett Area School Board*, 732 F.Supp. 39 (W.D. Pa. 1989); *cf. Daniels*, 474 U.S. at 334-35. Such frivolous claims almost surely would include Respondent's carpal tunnel syndrome, lifting and slip-and-fall hypotheticals (Respondent's Brief at 19-20) and the claim of the City's hypothetical sewer worker who destroys his wrist watch when rushing from the sewer to avoid asphyxiation. *Id.* at 23. Woe betide any plaintiff or plaintiff's attorney who files or prosecutes a frivolous or absurd lawsuit. *See* Rule 11, Federal Rules of Civil Procedure (ignored by the City and the NLC).

The "floodgates" also would not be opened, by permitting this Complaint to be prosecuted, to suits by state employees against the State or suits by federal employees against the United States. The States *and* their agents are protected by Eleventh Amendment sovereign immunity from such claims. *E.g., Quern v. Jordan*, 440 U.S 332 (1979);

Edelman v. Jordan, 415 U.S. 651 (1974). A State also is not a "person" and therefore cannot be sued under Section 1983. *Will v. Michigan State Department of Police*, 491 U.S. 58 (1989). Similarly, the United States is not a person within and cannot be sued under Section 1983. *Cf. Will.* Nor is action by the United States or its agents "under color of state law" within Section 1983. Moreover, the United States itself is protected by sovereign immunity from actions against it, constitutional or otherwise. The Federal Tort Claims Act provides the only remedy against the United States to a government worker making claims similar to those of Collins. *See, e.g.*, 28 U.S.C. Sections 2671, *et seq.*, and Sections 2676 and 2679(b)(1) thereof.

CONCLUSION

For the foregoing reasons, the Judgment of the United States Court of Appeals of the Fifth Circuit should be reversed and the case should be remanded to that Court with instructions to direct the United States District Court for the Western District of Texas to vacate its Judgment of dismissal. Alternatively, the Court should instruct the Court of Appeals to decide or have the District Court decide in the first instance, the question whether Collins has properly asserted a right protected by the Fourteenth Amendment.

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Respectfully submitted,

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